



1. On March 11, 1998, Complainant filed a Charge of discrimination with the Department alleging Respondent discriminated against her on the basis of her age.
2. Subsequently, Complainant elected to pursue her claim in federal court under an analogous federal cause of action.

3. On September 15, 1998, Complainant made a written request to the Department to withdraw her Charge.
4. On September 15, 1998, Complainant notified EEOC that she was withdrawing her Charge from the Department and requested a right to sue notice from EEOC.
5. On September 21, 1998, the Department issued an Order of Dismissal approving the request to withdraw and dismissing the Charge.
6. Complainant filed an action in federal court on January 8, 1999 alleging age discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA). 29 U.S.C. 621 et.seq.
7. On June 1, 2000, United States District Court Judge Elaine E. Bucklo issued an order dismissing Complainant's federal cause of action for lack of subject matter jurisdiction, citing a recent U.S. Supreme Court decision, *Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000).
8. Complainant, on her own behalf, filed a Complaint with the Illinois Human Rights Commission on August 29, 2000 attaching the previously filed Charge of Discrimination as part of the Complaint.

### CONCLUSION OF LAW

The Commission lacks jurisdiction over this Complaint because it was not timely filed pursuant to section 5/7A-102(G) of the Act.

### DISCUSSION

The Complainant filed a Complaint against Respondent on her own behalf on August 29, 2000 with the Illinois Human Rights Commission alleging to have been aggrieved by practices of age discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. Section 621 et.seq. (1986), and the Civil Rights Act of 1991. Complainant attached a copy of a previously filed Charge of Discrimination as part of the Complaint.

Complainant had previously simultaneously filed a Charge of Discrimination with the Illinois Department of Human Rights and with the Equal Employment Opportunity Commission (EEOC) on March 11, 1998.

Complainant filed a Voluntary Withdrawal Request Form with the Department on September 15, 1998. The form was signed by the Complainant's Attorney, Barry Gomberg, and indicated that the withdrawal was being made of "my own free will, without pressure from any organization or individual." Complainant submits a notice dated September 15, 1998, signed by attorney Gomberg addressed to EEOC that she was withdrawing Charge #1998 CA 2252 from the Department and requesting a Right to Sue Notice.

The Department issued an Order of Dismissal on September 21, 1998. EEOC issued a Notice of Right to Sue on November 16, 1998. Complainant filed an action in federal district court on January 8, 1999 alleging violation of the ADEA. Complainant then re-

filed her action in the Circuit Court of Cook County, voluntarily non-suited that case and then filed her claim at the Commission on August 29, 2000.

Respondent contends that none of the jurisdictional provisions of the Act apply to the Complaint. Respondent argues that the Department was not permitted to fully investigate its claim or to file a Complaint on behalf of the Complainant because the Complainant made a conscious choice to withdraw her Complaint. Respondent further contends that the Complaint does not allege any violations of the Act, but instead, alleges violations of the ADEA, a federal cause of action, which the Commission has no jurisdiction over.<sup>1</sup>

Respondent further argues that Complainant made the decision to withdraw her Complaint from the Department in the face of several federal decisions strongly suggesting that federal jurisdiction over such complaints was tenuous, i.e. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *City of Boerne v. Flores*, 521 U.S. 507 (1997); and *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11<sup>th</sup> Cir. 1998).

Complainant argues that, at the time she filed her charge with the Department and subsequently withdrew the Charge, the law in the federal seventh circuit was that the 11<sup>th</sup> Amendment did **not** preclude a State employee from seeking damages for violation of the ADEA in federal court. Complainant cites *Wichmann v. Board of Trustees of Southern University*, 180 F.3d 791 (7<sup>th</sup> Cir. 1999), contending the decision in *Wichmann* expressly rejected the argument of the defendant that the plaintiff's ADEA claim was barred by the 11<sup>th</sup> Amendment. Complainant refers to part of the decision in *Wichmann*, which cites several cases where the 7<sup>th</sup> Circuit had rejected similar arguments.

Complainant contends that, contrary to current 7<sup>th</sup> Circuit interpretation, the subsequent opinion by the United States Supreme Court issued in 2000 held that, under the 11<sup>th</sup> Amendment, the states **are** immune from suits brought by private individuals in federal court under the provisions of the ADEA, *Kimel v. Florida Board of Regents*, 120 S.Ct. 631, 145 L.ED.2d 522 (2000). Complainant contends that the high court decision was issued during the pendency of Complainant's federal case, prompting the federal district court sua sponte order dismissing Complainant's pending claim for lack of subject matter jurisdiction.

Complainant submits the Affidavit of Jeffrey Drager, which identifies Mr. Drager as the current Manager of the Charge Processing Division of the Department. Mr. Drager states that the past practice and procedure of the Department was that, in order to receive a right

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<sup>1</sup> Although it appears that the Complainant has specifically alleged only federal causes of action on the face of her Complaint, Complainant attached the underlying Charge of discrimination to the Complaint as Exhibit A and has made specific reference to the Charge in her Complaint. Further, Complainant has represented during oral argument that, assuming the Complaint withstands the instant motion, she intends to request leave to amend the Complaint to specifically allege violations of the Illinois Human Rights Act. Because the Complaint with the exhibit attached sufficiently alleges facts which are violations of the Illinois Human Rights Act and there are no provisions in the Act that would prevent an Administrative Law Judge from exercising discretion to allow the Complaint to be amended to add these allegations to the face of the Complaint, this issue need not be addressed.

to sue letter from the EEOC, a Complainant must have completed a Department form stating that the Complainant was withdrawing the appropriate allegations of the charge which she intended to file in federal court.

Complainant cites *Gonzales v. Human Rights Commission*, 179 Ill. App. 3d 362, (1<sup>st</sup> Dist. 1989); *Larrance v. Human Rights Commission*, 166 Ill.App.3d 224, 519 N.E.2d. 1203, (4<sup>th</sup> Dist. 1988); *Husch v. Szabo Food Service Co.*, 851 F.2d. 999 (7<sup>th</sup> Cir. 1988); *Ciers v. O.L. Schmidt Barge Lines, Inc.* 285 Ill.App.3d 1046, 675 N.E.2d (1<sup>st</sup> Dist. 1996) citing *Walck v. Dsicavage*, 741 F.Supp.88 (E.D.Pa.1990); and *Comdisco, Inc. v. Dun & Bradstreet Corp.*, 306 Ill.App.3d 197, 713 N.E.2d 698 (1<sup>st</sup> Dist. 1999), in arguing that the facts of this case warrant the application of the doctrine of equitable tolling in order to relate the Complaint filing with the Commission back to the original timely filed Charge with the Department.

Complainant's reliance on the cited cases is misplaced. In *Gonzales*, the time period was tolled when the Complainant had filed his Charge with the Department in a timely manner; however, the Department had not typed and verified the Charge until after the 180-day time period. The facts here are not analogous.

In *Larrence*, the Commission's decision that it lacked jurisdiction over the matter was upheld. The complainant had relied on the Department intake officer's interpretation that the date of termination, rather than the date of notice of the termination, began the running of the 180-day filing period. The fourth district appellate court said that the employer had engaged in no misconduct and the agency representative did not mislead the petitioner as the agency position and its interpretation of the law were correctly stated to the petitioner; however the interpretation was altered by a judicial decision. Therefore, neither the agency nor the employer intentionally misled the petitioner to his disadvantage and equitable tolling did not apply.

Although Complainant correctly cites the language within the *Larrence* decision -- that equitable tolling could be applied to prevent injustice when an administrative agency knowingly misled the complainant or in some manner acted unfairly-- this is simply not the situation here.

In *Walck*, tolling of the federal admiralty statute of limitations was allowed because the Plaintiff was reasonably mistaken as to geographical location of her cause of action since her personal injury was sustained while boating in waters that were close to the Maryland/Delaware border. Again, the facts here are not analogous.

In *Husch*, equitable tolling was allowed in federal court on plaintiff's ADEA claim because plaintiff had made a good faith effort to pursue her state administrative remedies by filing her claim with the Illinois Department of Human Rights; however, the district court found that the alleged discriminatory act had occurred in Connecticut. The seventh circuit ruled that justice required the suspending of the statute of limitations because the corporate structure of the defendant was contradictory and confusing and had made it

difficult for plaintiff to decipher the appropriate venue in which the discriminatory act took place. Again, the instant case presents no such facts.

In *Comdisco*, the time period for filing an appeal was tolled because the trial court failed to follow its standard operating procedure, which was to mail the final judgment to the Parties. There is no similar oversight with the facts in the instant case.

In *Ciers*, which more closely analogizes the facts in the instant case, Plaintiff voluntarily dismissed his first federal complaint and filed a second complaint pursuant to a different federal cause of action. Defendant was successful on a motion for summary judgment based on a federal three-year statute of limitations as to the pending claim. The first district appellate court upheld the district court decision, ruling that Plaintiff's voluntary dismissal and the Defendant's lack of any conduct which led the Plaintiff to act to his detriment precluded equitable tolling.

Complainant also makes the argument that the Code of Civil Procedure at 735 ILCS 13-217 provides for the tolling of limitations periods where the action is dismissed by a United States District Court for lack of jurisdiction. The Code of Civil Procedure is persuasive upon Commission proceedings in some instances where there is no precise Commission rule, Commission Procedural Rules at Section 5300.720; however, the Commission operates by its own procedural rules and Complainant cites no authority that the cited section applies to proceedings of administrative agencies. Additionally, that same section also provides that no action which is voluntarily dismissed by the plaintiff or dismissed for want of prosecution by the court may be filed where the time for commencing the action has expired.

Complainant frames the instant issue as: **Whether complainant should be permitted to proceed with her age discrimination claim after her federal court case was dismissed for lack of subject matter jurisdiction as a result of a substantive change in the law concerning the State's immunity from suit under the Eleventh Amendment.**

The answer lies in a careful analysis of the facts of this case. Complainant made a timely filing of an appropriate claim pursuant to the Act with the Department and a simultaneous filing with the EEOC on March 11, 1998. Complainant then elected to proceed with her complaint in federal court by requesting a Right to Sue letter from EEOC.

The Drager affidavit submitted by Complainant indicates that the past practice of the Department did not allow a Complainant to stay a charge of discrimination in order to pursue the action in federal court and that the Department required a Complainant to file a voluntary withdrawal form issued by the Department in order to request a Right to Sue letter from EEOC. This affidavit has little impact on Complainant's position, as Complainant does not allege her actions were influenced by the Department's past practice or that she voluntarily withdrew in reliance on this past practice.

A similar Department practice has been addressed by the Commission in several Commission panel decisions made pursuant to a Request for Review after the Department had dismissed the charges instead of administratively closing them. In *Goodman and City of Chicago, Department of Personnel*, \_\_\_Ill.HRC\_\_\_, (1989CF1977, November, 1992), a Commission panel said that the Department may not dismiss a case based upon a parallel state or federal proceeding; that the proper procedure is to administratively close a charge pending before it in accordance with Section 7-109.1 of the Act. See also, *Horbas and St. Joe Container Co.*, \_\_\_Ill.HRC\_\_\_, (1985CF2507, November, 1993); *Zoetvelt and Illinois Bell Telephone Co.*, \_\_\_Ill.HRC\_\_\_, (1987CF0544, November, 1993); *Massey and Outboard Marine Corp.*, \_\_\_Ill.HRC\_\_\_, (1991CA3079, August, 1993); *Greenberg and Nahser*, \_\_\_Ill.HRC\_\_\_, (1992CA3383, August 1993); *Sullivan and Griffin Wheel Co.*, \_\_\_Ill.HRC\_\_\_, (1989CF1540, June 1993); *Rhode and Board of Education Community Unit School Dist. No. 428*, \_\_\_Ill.HRC\_\_\_, (1991CF1683, June 1993).

Additionally, Section 5/7A-102(G)(4) specifically addresses this situation where a federal filing is made while a Charge is pending at the Department, stating that, for Charges filed on or after January 1, 1996, the Department shall stay any administrative proceedings after the filing of a civil action under any federal or State law.

Had this been done, Complainant would have then been able to proceed on the Charge with the Department since the federal decision did not dispose of the issues raised in the Charge. See *Massey and Sullivan, supra*. Instead, the Complainant voluntarily dismissed her claim with the Department.

Respondent argues that, by voluntarily dismissing her Charge with the Department, the Complainant did not allow the Department the statutory time period to complete its investigation, nor did she file a Complaint within the relevant time period, in accordance with Sections 5/7A-102(G)(1) and 5/7A-102(G)(2); therefore, there are no jurisdictional provisions to support Complainant's having filed her Complaint with the Commission. Respondent further counters that, although Complainant suffered an adverse result in federal court, these circumstances do not come within any provisions of the Act that would allow the Commission to exercise jurisdiction over the Complaint.

Respondent's argument is convincing. A Complaint is properly filed before the Commission by the Department within 365 days of a properly filed charge, or within any extension of that period agreed to in writing by all parties; or by the aggrieved Party between 365 and 395 days after the charge is filed with the Department, or within such longer period agreed to in writing by all parties, if the Director has not sooner issued a report and determination. Complainant's Complaint was not filed within these statutory parameters; therefore, there is no basis for jurisdiction before the Commission.

## RECOMMENDATION

I recommend that this Complaint be dismissed with prejudice.

**HUMAN RIGHTS COMMISSION**

**By:** \_\_\_\_\_  
**SABRINA M. PATCH**  
**Administrative Law Judge**  
**Administrative Law Section**

**ENTERED: July 2, 2001**